

LAW OFFICES
HALEY, BADER & POTTS

4350 NORTH FAIRFAX DR., SUITE 900

ARLINGTON, VIRGINIA 22203-1633

TELEPHONE (703) 841-0808

FAX (703) 841-2345

POST OFFICE BOX 18006

WASHINGTON, D.C. 20036-8006

TELEPHONE

(202) 331-0808

SUSAN H. ROSENAU
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JUN - 1 1993

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

June 1, 1993

By Hand

Donna R. Searcy

Secretary

Federal Communications Commission

Washington, D.C. 20554

RE: MM Docket No. 93-42, Calistoga, California

Dear Ms. Searcy:

On behalf of Moonbeam, Inc., an applicant (File No. BPH-911115MG) for a New FM Station on Channel 265A in Calistoga, California, please find the original and six copies of the Opposition to Second Petition to Enlarge in the above-referenced proceeding.

Kindly communicate any questions directly to this office.

Yours very truly,



Susan H. Rosenau

Enclosures (6)

cc: Moonbeam, Inc.
Larry Miller, Esquire
A. Wray Fitch, Esquire
Administrative Law Judge Edward Luton

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Before The

Federal Communications Commission JUN - 1 1993

Washington, D.C. 20554

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In re Applications Of)	Docket No. <u>MM 93-42</u>
MOONBEAM, INC.)	File No. BPH-911115MG
GARY E. WILLSON)	File No. BPH-911115MO
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

Opposition to Second Petition to Enlarge

Pursuant to Section 1.229 of the Commission's Rules,
Moonbeam, Inc. ("Moonbeam"), by its attorneys, respectfully opposes
Gary Willson's Second Petition to Enlarge Issues, filed May 14, 1993,
stating in support thereof as follows:

Preliminary Statement

1. Moonbeam and Willson are competing applicants for a new FM station on Channel 265A at Calistoga, California. The Hearing Designation Order ("HDO") in the above-captioned proceeding was released on March 8, 1993.

2. The HDO designated the following issues:

- To determine which of the proposals would, on a comparative basis, best serve the public interest.
- To determine, in light of the evidence adduced pursuant to the specified issues, which of the applications should be granted, if any.

3. Pursuant to Section 1.229, motions to enlarge the issues in a comparative broadcast proceeding are to be filed by thirty ("30") days after the release of the Hearing Designation Order. The filing period for such motions expired on April 7, 1993.

4. On May 14, 1993, Willson filed and served on Moonbeam a Second Petition to Enlarge Issues ("Pet."), seeking the addition of financial qualification and false certification issues on the basis of the following purported "evidence":

- Moonbeam's initial application listed as the source of funds to construct and operate Moonbeam's proposed station "J Langworth Manion, Banker, Alex Brown & Sons;" Moonbeam's March 2, 1991 application amendment listed as the source of funds "Mary F. Constant;" and in response to the standardized

5. As shown below, Willson's petition is frivolous and based on rank speculation and the distortion and misconstruction of facts. Further, Willson's petition should be dismissed as untimely.

ARGUMENT

I. WILLSON'S PETITION IS FRIVOLOUS

A. The Source and Location of Moonbeam's Funding Is Obvious

6. In his petition, Willson makes the incredible argument that Moonbeam's March 2, 1992 amendment to its application reflects a change in the source of its funding, and together with the statement of account provided by Moonbeam pursuant to Section 1.325(c) of the Commission's Rules¹, raises a substantial and material issue regarding Moonbeam's financial qualifications (Second Petition to Enlarge Issues, filed May 14, 1993 ("Willson 2Pet.") at 3-4). Willson further argues that the lack of a written agreement to provide such funding also supports the addition of a financial issue against Moonbeam (*id.* at 3-4, 9).

7. The Declaration of Mary Fairbanks Constant, submitted herewith as Exhibit A ("Constant Dec."), states in black and white what should have been obvious to Willson from his own exhibits. Ms. Constant's initial application listed the *location* of the funds she has earmarked for the construction and operation of the station, and the name of her financial advisor at that institution, instead of the name and address of the *owner* of the funds, i.e., Mary Constant. That fact was clarified in her March 2, 1991 amendment. Ms. Constant's money is --

¹ Which, incidentally, constitutes 100% more proof of financial wherewithal to construct and operate than Willson has provided to date.

and was at the time of her initial application -- held by Alex, Brown & Sons, Inc. Her financial advisor there is J Langworth Manion. Both facts are reflected on the face of the account statement produced to Mr. Willson in discovery and submitted by Willson as Exhibit 2 to his Petition.

8. The fact that Ms. Constant has made no written agreement to provide the funds is both legally and factually irrelevant. Form 301 requires the applicant to have a written agreement, if at all, only *after* third-party funds have been provided (Willson 2Pet at 6 and Exhibit 7 at 3(b)). The lack of a written agreement is probative of nothing and certainly raises no substantial or material question of fact at this juncture. Mary F. Constant is the 100% shareholder, sole director and president of Moonbeam, Inc. There is a 100% identity of interest here. A written commitment would constitute a meaningless legal fiction. On Moonbeam's application, *Ms. Constant* certified that she will make available *Ms. Constant's money* to build the station for *Ms. Constant's corporation*, which fact Ms. Constant has reaffirmed under penalty of perjury (Constant Dec. at 1). The money was available at the time Moonbeam filed and amended its application, and is available now (*id.*).² *Cf. Northhampton Media Associates*, 4 FCC Rcd. 5517, 5518-19 (1989), *affirmed*, 941 F.2d 1214 (D.C.Cir. 1991). Anything else Willson may allege is smoke and mirrors in an effort to harass his opponent.

²Willson's attempt in the last line of his petition to raise an issue over whether the retirement funds can be used to fund the station lacks merit. Willson has not stated (and may not state for the first time on reply), any reason the funds could not be so used. Moonbeam is aware of no such reason. Even if Ms. Constant incurs withdrawal penalties or tax consequences as a result, that has no bearing on Moonbeam's financial qualifications.

B. Mary Constant's Certification Was Genuine

9. Willson speculates that, because Ms. Constant did not have a financial statement at the time of his April 15, 1993 supplemental document request, she did not have a financial statement at the time Moonbeam's initial application or March 2, 1992 amendment were filed (Willson 2Pet at 5). Willson attempts to support his assumption by falsely stating that Moonbeam neither objected to producing Ms. Constant's individual financial statement nor produced the statements (*id.*). Willson misstates the facts on both points.

10. Moonbeam said *nothing* regarding whether Ms. Constant had a financial statement at the time the financial certification was made, and in fact, Ms. Constant had one at that time, and based her certification ~~thereon~~ (Constant Dec. at 2-3). With her papers packed

The referenced paragraph specifically objects that *Ms. Constant's* financial documents are irrelevant because of the lack of a financial issue.

12. Willson's further assertion that Moonbeam's lack of a written agreement from Mary Constant renders false Moonbeam's certification is equally frivolous. First, as set forth in Section A, *supra*, no written agreement is necessary in these circumstances. Second, Ms. Constant's *past* purchase of stock is in fact memorialized in Moonbeam's corporate minutes, which reflect the payment terms for said stock and which were produced to Willson as part of the standardized document production. A copy of the minutes are attached as Exhibit C hereto.

13. Accordingly, it is clear that Willson's "false certification" issue is nothing but a "false alarm" and must be dismissed.

**C. The Tax Lien Has No Bearing On
Moonbeam's Financial Qualifications**

14. Willson's final assertion, that the recent and brief existence of a state tax lien against Ms. Constant and her husband raises an issue of whether Moonbeam is financially qualified to build and operate the proposed station (Willson 2Pet. at 5, 8). Willson again distorts the record.

15. *Las Americas* involved a tax lien which existed *at the time the applicant signed the financial certification*. *Las Americas Communications, Inc.*, 101 FCC2d 728, 731 (Rev. Bd. 1985). The tax lien notice submitted by Willson unequivocally shows that this lien was not imposed until August 14, 1992, long after the filing of Moonbeam's initial application and amendment (Willson 2Pet, Exhibit 6). The tax lien also

reflects that Ms. Constant and her husband *had made a tax payment of \$2,655.00. (id.)*. This was not a case of nonpayment, but a dispute between the Constants and the state tax authorities concerning the amount of tax legally owed (Constant Dec. at 2-3). The lien thus neither reflects inability nor unwillingness to pay taxes legally owed. The lien has, in any event, been paid and released (*id.* at Exhibit 1).³ Accordingly, Willson have offered no evidence to the contrary, no substantial or material issue regarding the tax lien exists.

II. WILLSON'S PETITION SHOULD BE DISMISSED AS UNTIMELY

16. Willson's petition was not filed until May 14, 1993, long past the deadline for filing enlargement petitions. Willson asserts that his petition is nonetheless timely because Moonbeam's April 28, 1993 response regarding Ms. Constant's financial statement constituted "newly discovered evidence," triggering a fifteen-day window for filing enlargement motions based thereon (Willson 2Pet. at 2). That assertion cannot be extended to the arguments regarding the tax lien and the source of funding, all of which on their face indicate that they were available prior to the release of the HDO.

17. The Commission has specifically stated that a petition to enlarge issues based on newly discovered evidence is timely *only* if filed within 15 days after "the facts are known or *could reasonably have been known* to the moving party." *Great Lakes Broadcasting, Inc.*, 6 FCC Rcd

³ The lien was, in fact, release prior to Willson's filing of the instant petition, which at a minimum reflects insufficient investigation on his part, or perhaps a more deliberate attempt to conceal relevant facts. The same might be said concerning Willson's attachment to his motion of exhibits never mentioned in his text and in no way relevant to this proceedings, relating to a tax lien against a corporation owned by Ms. Constant's husband.

4331, 4332 (1991). The Commission strictly construes this requirement in order to expedite the hearing process and the institution of new service, and because "no judging process could operate efficiently or accurately if an applicant is allowed to sit back and hope for a decision in its favor and to parry with an offer of more evidence when faced with an adverse decision." *Id.* at 4333, *citing Colorado Radio Corp. v. FCC*, 118 F.2d 24, 26 (D.C. Cir. 1941).

18. Section 1.229 provides that untimely petitions to enlarge issues will be considered only if the petitioner shows "good cause" for the tardiness, or if the petition raises an issue of "probable decisional significance" AND "such substantial public interest importance as to warrant consideration in spite of its untimely filing." 47 C.F.R. 1.229(c); *Great Lakes, supra*, at 4332. To establish "probable decisional significance," Willson must establish that the "likelihood of proving the . . . allegations . . . is so substantial as to outweigh the public interest benefits inherent in the orderly and fair administration of the Commission's business." *Id.* Because as set forth in Part I, *supra*, all of the issues are frivolous, Willson is unable to make such a showing under any circumstances.

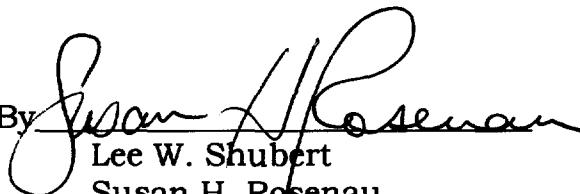
19. Willson has had the means to investigate Moonbeam's application since, at the latest, March, 1992, and the tax lien since August, 1992. As in his first petition, he failed to do so and has given no excuse for his failure. Accordingly, his petition should be dismissed.

CONCLUSION

Willson's petition is frivolous and borders on abuse of process. The supposed basis for his petition wholly lacks substance and demonstrates either profound obtuseness or an intent to harass. Further, even if his petition had merit, Willson has presented no good cause for his untimeliness, and no showing of decisional significance and compelling public interest to overcome his untimeliness. Accordingly, the petition should be dismissed.

Respectfully submitted,

MOONBEAM, INC.

By 
Lee W. Shubert
Susan H. Rosenau

Its Attorneys

HALEY, BADER & POTTS
Suite 900
4350 North Fairfax Drive
Arlington, VA 22203-1633
703/841-0606

June 1, 1993

EXHIBIT A

Before The
Federal Communications Commission
Washington, D.C. 20554

In re Applications Of)	Docket No. MM 93-42
)	
MOONBEAM, INC.)	File No. BPH-911115MG
)	
GARY E. WILLSON)	File No. BPH-911115MO
)	
For a Construction Permit for a)	
New FM Station on Channel)	
265A in Calistoga, California)	

To: The Honorable Edward Luton
Administrative Law Judge

Declaration of Mary Fairbanks Constant

Mary Fairbanks Constant, under penalty of perjury, declares as follows:

1. I make this declaration on the basis of personal knowledge.
2. I am the President, sole shareholder and director of Moonbeam, Inc. ("Moonbeam"), applicant herein.
3. The funds required to construct and operate Moonbeam's proposed station in Calistoga, California are held, and were held at the time I filed Moonbeam's application and the March 2, 1992 amendment thereto, in my retirement account with Alex, Brown & Sons, Incorporated, account number 247-16120. As indicated in Exhibit A hereto, my investment broker at Alex, Brown was then, and still is, J Langwith Manion, Jr.

4. The title of the foregoing account is Mary F. Constant, Abbie & Bianco Retirement Fund. Abbie and Bianco are my two dogs, a Bernese Mountain dog and a West Highland terrier. I named this account after my dogs to distinguish it from another retirement account in my name held at Alex, Brown.

5. I will provide all necessary funds for the station's construction and the first three months of operations. I have the necessary funds and had the funds at the time I filed my original application. The listing of Alex, Brown & Sons and J. Langworth Manion on my original application was solely intended to identify the location of the funds, not their owner, and when I perceived the ambiguity I

8. As reflected in Exhibit B hereto, the tax lien described by Mr. Willson was paid in full and released on April 14, 1993, and was based on a disparity in the amount which I and Mr. Constant calculated was due, and the amount calculated by the State of California. We had paid the \$2655.00 we believed to be due.

Executed this 28 day of May, 1993.


Mary Fairbanks Constant

EXHIBIT B

MINUTES OF THE FIRST MEETING OF THE
BOARD OF DIRECTORS
MOONBEAM, INC.

The first meeting of the Board of Directors of Moonbeam, Inc., an Idaho corporation, was held in Boise, Idaho, at 10:30 A.M. on the 27 day of May, 1991, as follows, to-wit:

The undersigned, Being the Director of Moonbeam, Inc., an Idaho corporation, consents to the transaction and conduct of any and all business to properly come before the Board.


Mary Fairbanks Constant

Mary Fairbanks Constant, acting chairman, first considered the appointment of officers of the corporation to serve for the next ensuing year, or until successors shall have been duly elected and qualified.

Whereupon, the following person was appointed to the respective offices:

Name:

Office:

Mary Fairbanks Constant
Mary Fairbanks Constant
Mary Fairbanks Constant

President
Vice-President
Secretary/Treasurer

The President then considered the issuance of the stock of the corporation. The following resolution was thereupon adopted.

WHEREAS, It is deemed advisable by the Board of Directors that this corporation offer for sale and issue up to 100,000 shares of the common stock authorized by the Articles of Incorporation, at a par value of \$100.00 per share; and

WHEREAS, There is not now outstanding an offering or portion thereof of this corporation to sell or issue any of its stock;

NOW, THEREFORE, BE IT RESOLVED That the officers of this corporation are hereby authorized and directed to offer for sale and to sell and issue up to 100,000 shares of the common stock of the corporation for at least \$100.00 per share.

The President next considered the adoption of the By-Laws, the impression of the corporate seal and the stock certificates. The following resolution was thereupon adopted.

BE IT RESOLVED That the Board of Directors of this corporation hereby adopt, approve, accept, ratify and certify the By-Laws, a true and correct copy of which are hereby authorized to be placed in the minute book of the corporation.

The following resolution was thereupon adopted.

WHEREAS, Mary Fairbanks Constant has tendered to the corporation the sum of \$1,000.00 for the purpose of purchasing shares in the corporation; and

WHEREAS, As the result of the tender of said \$1,000.00, the said Mary Fairbanks Constant is entitled to purchase 10 shares of the common stock of the corporation at the par value of \$100.00 per share; and

WHEREAS, The stock issued hereunder is to be designated as Section 1244 stock pursuant to Section 1244 of the Internal Revenue Code;

NOW, THEREFORE, BE IT RESOLVED, That the officers of the corporation be and the same hereby are authorized, empowered and directed to issue to Mary Fairbanks Constant, 10 shares of the common stock of the corporation.

BE IT FURTHER RESOLVED That the stock so issued pursuant to this resolution be designated Section 1244 stock pursuant to Section 1244 of the Internal Revenue Code.

The President next considered the proposed election by the corporation to be taxed as a small business corporation pursuant to Subchapter S of the Internal Revenue Code of 1954 as amended. The following resolution was thereupon adopted.

WHEREAS, The shareholder of the corporation individually elected, pursuant to §1372(i) of the Internal Revenue Code, to have this corporation treated as "an electing small business corporation" for income tax purposes; and

WHEREAS, The Director has reviewed the status of the corporation and is of the opinion that the corporation qualifies to make such an election by meeting the requirements as set forth in §1371 of the Internal Revenue Code, et. seq.; and

WHEREAS, The Board of Directors having considered the incidents of taxation with respect to this corporation and its shareholder, and having considered the benefits to be derived by the corporation and the shareholder individually, has decided it would be in the best interest of all concerned for the corporation to make such election.

NOW, THEREFORE, BE IT RESOLVED, The Board of Directors of the corporation hereby directs and authorizes its President and/or Secretary to execute on behalf of the corporation form 2553, electing to have the corporation treated as "an electing small business corporation" and to obtain the consent of the shareholder, including any person holding community property interests in shares of stock of the corporation, to file form 2553 in duplicate with the Internal Revenue Service, 1160 West 1200 South Street, Ogden, Utah, 84201, via certified mail, and to perform all other acts necessary to achieve a proper election.

BE IT FURTHER RESOLVED, That the Board of Directors hereby elects the Secretary of the corporation to attach a copy of the fully executed form 2553 as filed to the official minutes of this meeting as Exhibit "I" to be included herein as if set forth in full.

The President then considered the ratification of the acts of the incorporator, Mary Fairbanks Constant, taken for or on behalf of the corporation. The following resolution was thereupon adopted.

BE IT RESOLVED, That the Board of Directors of the corporation declares that all actions of Mary Fairbanks Constant taken for and on behalf of the corporation prior to the actual incorporation of the corporation, are hereby ratified, confirmed and approved.

There being no further business to come before the meeting, the same was adjourned.


Mary Fairbanks Constant.

EXHIBIT C

Recording Requested by

STATE OF CALIFORNIA
FRANCHISE TAX BOARD
Sacramento, CA 95812-2952
Telephone (916) 369-4350

And When Recorded Mail to

Special Procedures Section

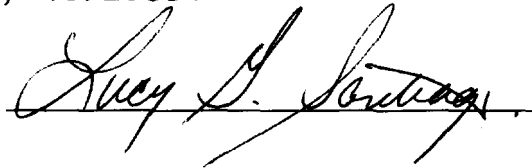
CERTIFICATE OF SERVICE

The undersigned, an employee of Haley, Bader & Potts, hereby certifies that the foregoing Opposition to Second Petition to Enlarge Issues was mailed this date by First Class U.S. Mail, postage prepaid, or was hand-delivered*, to the following:

A. Wray Fitch, III, Esquire
Gammon & Grange
8280 Greensboro Drive
McLean, VA 22102-3807

Administrative Law Judge Edward Luton
2000 L Street N.W.
Washington, D.C. 20036

Larry Miller, Esquire*
Federal Communications Commission
Mass Media Bureau, Hearing Branch
Suite 7212
2025 M Street N.W.
Washington, D.C. 20554

A handwritten signature in cursive script, appearing to read "Lucy D. Santiago", is written over a horizontal line.

June 1, 1993